

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 252
3042014

BETWEEN APOSTOL RADEV
Applicant

AND MG FOODS LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Mike Harrison, advocate for the Applicant
Joseph Harrop, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and Other 29 March 2019 from the Applicant
Information Received: 5 April 2019 from the Respondent

Date of Determination: 30 April 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination only determines Mr Radev's claim that he has not been paid any annual holiday pay, either while employed, or upon termination of his employment.

[2] Mr Radev seeks recovery of wage arrears relating to his unpaid annual holiday entitlements together with a penalty for MG Foods Limited's (MG Foods') failure to keep holiday and leave records for Mr Radev, as required by the Holidays Act 2003 (HA03).

[3] MG Foods Limited denies that Mr Radev is owed any wage arrears. It says that he worked reduced hours and days on a regular basis but was always paid as if he had been at work for his full time working hours.

[4] MG Foods claims that its full payment to Mr Radev of his contractual salary, even though he had not worked all of his contractual hours, satisfied its obligations to pay him annual holiday entitlements under HA03. MG Foods admits it did not keep a record of the reduced hours it claims Mr Radev worked.

[5] Mr Radev was employed by MG Foods as a Marketing Manager on 30 May 2016 and he resigned from his employment on 13 July 2018.

[6] Mr Radev requested his holiday and leave records from MG Foods, but these were not provided. The Authority directed MG Foods to provide it with a copy of Mr Radev's holiday and leave records, but that did not occur.

[7] MG Foods' counsel confirmed to the Authority that MG Foods had not kept holiday and leave records, as required by s 81 of the HA03.

[8] MG Foods' failure to keep, and provide upon demand, holiday and records for Mr Radev means that in determining this matter the Authority can rely on s 83 HA03.

[9] Therefore, in accordance with s 83 of the HA03, the Authority finds that MG Foods' breach of s 81 of the HA03, by failing to keep holiday and leave records for Mr Radev, has prevented Mr Radev from bringing an accurate wage arrears claim for unpaid annual holiday entitlements.

[10] Given that finding, the Authority now accepts as proven, because there was an absence of credible evidence to the contrary, evidence from Mr Radev that he has not been paid any annual holiday pay and he did not take any paid annual holidays in advance or while employed.

[11] Mr Milen Ganchev, Director of MG Foods, provided the Authority with an affidavit dated 19 March 2019 which responded to Mr Radev's affidavit which was dated 6 March 2019.

[12] Mr Ganchev, in his affidavit, stated that *"Due to the friendship and familiarity between myself and Mr Radev, he simply mentioned his days of leave in passing to me at the time, or after they arose. I let our reception staff know by phone, but nothing was ever recorded in writing."*

[13] Mr Ganchev claims that Mr Radev normally started work around 9:30am and finished around 3:30pm, including his lunch break, but was always paid for a 40 hour week, in accordance with clause 6 of his individual employment agreement dated 30 May 2016.

[14] Mr Ganchev said that this was not MG Foods's general practice regarding requests for annual leave. MG Foods usually requires 'requests for leave application forms' to be completed, and then approved, before an employee is permitted to take annual leave.

[15] However, Mr Ganchev said that his friendship with Mr Radev meant that Mr Radev was not required to apply for annual holiday, rather Mr Radev just told Mr Ganchev when he (Mr Radev) would be away from work. Mr Ganchev claims that it is as a result of this informal approach to annual leave taken by Mr Radev, that MG Foods does not have any written records of Mr Radev's annual leave.

[16] Mr Radev disputes that such an informal arrangement was in place. Mr Radev's position is that there are no 'annual leave application' records for him because he never applied for, or took, any annual holiday while employed.

[17] The failure by MG Foods to keep holiday and leave requirements as required by s 81 of the HA03 means that the Authority has not accepted Mr Ganchev's evidence that Mr Radev took in excess of eight weeks' paid annual holiday while employed.

[18] The Authority further notes that it is not open to an employer to decide that because an employee arrives at work later than their contractual start time, or departs work earlier than their contractual end time, that this time away from work can be treated as paid annual holiday or that the hours an employee arrives at work late or leaves work early can be unilaterally deducted from an employee's annual holiday entitlement.

[19] While there could potentially be an argument that could occur, if both parties negotiate and specifically agree on such an arrangement, provided it met the minimum code entitlements in HA03, there is no such documentation in this case. The Authority finds as a matter of fact that no such agreement was reached by the parties.

[20] The point of minimum annual holiday entitlements is to ensure that an employee is able to take paid time off work, at a time that suits them.

[21] There is no provision in the HA03 for an employer to whittle down an employee's annual holiday entitlements by deducting annual holiday entitlements every time the employer believes or perceives that the employee is not in the workplace during their normal contractual hours of work.

[22] The fact that there is no documentation at all, about the 'informal arrangement' Mr Ganchev says applied, fundamentally undermines his claim that Mr Radev mutually agreed to deal with his annual holiday entitlements in that way.

[23] If MG Foods believes that it could simply deduct annual holiday from Mr Radev, say if he was late to work or early departing from work, then it is wrong about that.

[24] If MG Foods had a problem with the times that Mr Radev was arriving at work or departing from work, then that should have been dealt with as a disciplinary/performance issue at the time. MG Foods could have elected not to pay Mr Radev for hours that he was expected/required to be at work but was not actually at work or working. However, that did not occur.

[25] MG Foods' failure to keep the required wage and time records means that the Authority has accepted Mr Radev's evidence that he took no paid annual holiday while employed and that he was not paid any annual holiday pay upon termination of his employment.

[26] Mr Radev is therefore entitled to be paid for eight weeks' annual holiday that he accrued, but has not been paid for, over the period 30 May 2016 to 30 May 2018.

[27] Mr Radev's annual leave for this two-year period is to be calculated in accordance with s 24 of the HA03, which provides for the calculation of annual holiday pay if an employee's employment ends after an entitlement to annual holidays has arisen.

[28] Accordingly, MG Foods is ordered to pay Mr Radev \$9,230.77 under s 24 of HA03 for the annual holidays he had accrued while employed but had not used before his employment ended on 13 July 2018. This is calculated at the rate of \$1,153.85 gross per week, for 8 weeks' annual holiday, based on Mr Radev's gross salary of \$60,000 per annum throughout his employment.

[29] Mr Radev is also, under s 25 HA03, entitled to annual holiday pay at the rate of eight per cent on his total gross earnings from his leave anniversary date of 30 May 2018 until his employment ended on 13 July 2018.

[30] In a memorandum produced to the Authority dated 5 April 2019, MG Foods stated that Mr Radev earned \$7,500 gross over that period. Mr Radev did not dispute that was the correct amount, so that figure is accepted by the Authority.

[31] MG Foods is therefore ordered to pay Mr Radev \$600 (being 8% of \$7,500) under s 25 of the HA03 as unpaid annual holiday pay from the period between his leave anniversary date of 30 May 2018 and his employment ending on 13 July 2018.

[32] That brings Mr Radev's total annual holiday pay arrears to \$98230.77 (\$9,230.77 accrued annual holiday + \$600 holiday entitlements from last leave anniversary to termination of employment).

[33] Nothing is to be deducted from this amount because the Authority has accepted Mr Radev's evidence that he did not take any paid annual holiday while employed or any paid annual holiday in advance of his entitlement arising.

[34] MG Foods is therefore ordered to pay Mr Radev total wage arrears of \$9,830.77 for unpaid annual holiday pay. That amount should have been paid to Mr Radev in the pay that related to his final pay period but that did not occur, in breach of s 27 of the HA03..

[35] That leaves Mr Radev's penalty claim to be determined. Penalties are possible for MG Foods' failure to keep holiday and leave records for Mr Radev, for failing to produce such records upon request and for not paying Mr Radev his annual holiday entitlements upon termination.

[36] However neither party has had an opportunity to address the Authority on whether a penalty should be imposed on MG Foods for its breaches of the HA03, and if so, at what level. The parties therefore will be given an opportunity to do so.

[37] MG Foods has seven days from the date of this determination within which to file evidence and/or submissions relating to Mr Radev's penalty claim. Mr Radev has seven days within which to respond. MG Foods has a further three working days within which to file any reply evidence or submissions on the penalty issue.

[38] The parties are encouraged to identify any comparison cases they want the Authority to consider as well as each of the factors identified in s 133A of the Act, that the Authority must consider when assessing penalties.

[39] MG Foods is ordered to pay Mr Radev annual holiday entitlement arrears of \$9,830.77 within 28 days of the date of this determination.

Rachel Larmer
Member of the Employment Relations Authority